

DEC 5 1978

MICHAEL RUDAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-898

F.C.Y. CONSTRUCTION AND EQUIP-
MENT COMPANY, INC., an Arizona
Corporation; WINEGLASS LIVE-
STOCK COMPANY, INC., an Ari-
zona Corporation; CHRISTINE
NICHOLS and CORRINE COOPER,

Petitioners,

v.

HARRISON, INC., a Minnesota
Corporation; HUGH A. HARRISON
and DOUGLAS A. RUSSELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
DIRECTED TO THE COURT OF APPEALS AND
THE SUPREME COURT OF THE STATE OF ARIZONA

RAINERI & RAINERI

By Joseph C. Raineri, Sr.

2001 North Scottsdale Road
Scottsdale, Arizona 85257*Attorneys for Petitioners*

IN THE
Supreme Court of the United States

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No.

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MENT COMPANY, INC., an Arizona
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IN THE UNITED STATES SUPREME COURT

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TO THE HONORABLE CHIEF JUSTICE WARREN
BURGER AND TO THE HONORABLE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully petition
for a hearing before this Honorable Court to
review and reverse summary judgments of the
Court of Appeals and the Supreme Court of the
State of Arizona rendered against the peti-
tioners.

OPINION BELOW

The memorandum opinion of the Court of Appeals dated June 6, 1978, is attached hereto as Appendix "A" and made a part hereof by reference.

Petitioners filed a timely Motion for Rehearing which was denied on July 10, 1978, and is attached hereto as Appendix "B" and made a part hereof by reference.

A timely Petition for Review was filed with the Supreme Court of the State of Arizona and was denied on September 7, 1978, and is attached hereto as Appendix "C" and made a part hereof by reference.

QUESTIONS PRESENTED

This litigation involved two separate actions. One was an action for Declaratory Judgment to establish petitioner's ownership in certain ranches, including the Eleven Lakes Ranch. The second action was one in which petitioners sought to have a constructive trust established in said ranches including the Eleven Lakes Ranch, because respondents acting in concert, collusively made certain fraudulent misrepresentations and thus surreptitiously deprived them of their interests in said ranches. The trial court summarily and wrongfully entered summary judgment in favor of the respondents in both of these actions.

1. Whether the action of the Arizona Court of Appeals in affirming the lower court judgments and directing the entry of summary judgments in both actions, when the record undisputably and unequivocally

revealed that there were disputed material questions of fact, which if resolved against respondents, could adversely affect final judgment without a trial on the merits is consistent with the Due Process Clause of the Fourteenth Amendment.

2. Whether the action of the Arizona Court of Appeals in affirming the lower court judgments and directing the entry of summary judgments as aforesaid without a trial on the merits before a jury is consistent with the Seventh Amendment, which provides that the right of trial by jury shall be preserved.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States Amendment XIV, § 1:

"---nor shall any state deprive any person of life, liberty or property, without due process of law---."

Constitution of the United States Amendment VII:

"In Suits at common law,---the right of trial by jury shall be preserved---."

STATEMENT OF FACTS

As above indicated, the petitioners commenced two actions to establish an ownership or fee title interest in certain ranches, including the Eleven Lakes Ranch, which respondents by one of their witnesses admitted itself had a valuation of

One Million Dollars. The petitioners had certain appeals pending in the Court of Appeals of the State of Arizona and based upon certain promises and representations made by the defendants who were predecessors in title to respondents with whom the latter were in privity, petitioners dismissed their appeals above-mentioned.

The petitioners filed a counter affidavit resisting the summary judgment applications by respondents which was executed by Corrine Cooper in which the latter set forth factual assertions. The Arizona Court of Appeals at p. 6 of its opinion hereto attached as Appendix "A" concedes that the contents of Corrine Cooper affidavit contained factual assertions, which were cognizable in a summary judgment determination, but notwithstanding it affirmed the action of the lower court erroneously granting summary judgments.

In addition, the record is replete with admissions on the part of respondents reflecting an outstanding ownership interest to be in the petitioners in the face of triable issues of fact.

Respondents wholly failed to controvert the affidavit of Corrine Cooper, *supra* (which the Court of Appeals in its opinion indicated contained factual assertions cognizable in summary judgment determination) such failure on the part of the petitioners constituted a judicial admission thereof which prevented the granting of summary judgments.

The respondents commencement of a quiet title action by way of a counterclaim against the petitioners likewise created a factual issue to be determined, which

indisputably, and unequivocally, would prevent the granting of summary judgments in these actions.

The defendants, in the foregoing actions, as predecessors in title to the respondents with whom the latter were in privity, and in making the foregoing misrepresentations, committed acts and pursued a course of conduct which was fraudulent, willful, malicious, and were consummated and perpetrated with a willful design to cheat and defraud petitioners, all of which constituted triable issues of fact in the record which prevented the granting of summary judgments and could have resulted in the imposition of a constructive trust had there been a trial on the merits.

REASONS FOR GRANTING THE WRIT

Throughout these proceedings, both in the lower court, and before the Arizona Court of Appeals and the Arizona Supreme Court, the petitioners were persistent and adamant in their contentions that the record revealed that there were triable issues of fact, upon which reasonable men might reach different conclusions, and that the trial court should have permitted the cases to go to trial upon the merits before a jury.

The actions of the Arizona Court of Appeals and the Arizona Supreme Court, cannot be squared, with the clear mandates of the Fourteenth Amendment and Seventh Amendment, in that the petitioners constitutional rights to due process and a trial by jury were clearly denied unto them as a result of the affirmance of the summary judgments entered in the lower court.

No chance was afforded to the petitioners to be confronted or to cross-examine those who were opposed to their fee title interest in these Ranches, including the Eleven Lakes Ranch. The Ranches in question, being worth millions of dollars; nor were the petitioners awarded the opportunity to present their own evidence relating to their ownership interests in said Ranch properties. *Slockower v. Board of Education*, 350 U.S. 551; *Perla v. New York*, 392 U.S. 296.

Petitioners were obviously denied their day in Court. Notice and an opportunity to be heard are fundamental principles of due process of law. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306; *In re Gault*, 387 U.S. 1; *Sniadich v. Family Finance Corp.*, 395 U.S. 337; *Randone v. Appellate Department*, 5 Cal. 3d 536.

Review by the United States Supreme Court of a decision of a state court is authorized if it is claimed that a state has in violation of the Federal Constitution, deprived petitioner of life, liberty, or property, without due process of law. *Napue v. People of State of Illinois*, 360 U.S. 264; *Slockower v. Board of Higher Ed. City of N. Y.*, 350 U.S. 551; *Hoyt v. State of Fla.*, 368 U.S. 57.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Arizona Court of Appeals.

Respectfully submitted,

RAINERI & RAINERI

By Joseph C. Raineri, Sr.

Attorneys for Petitioners

APPENDIX "A"
 IN THE
 COURT OF APPEALS
 STATE OF ARIZONA
 DIVISION ONE

F.C.Y. CONSTRUCTION AND EQUIP-)
 MENT COMPANY, INC., an Arizona)
 corporation; CHRISTINE NICHOLS)
 and CORRINE COOPER,)

Appellants,)

1 CA-CIV 3250

v.)

HARRISON, INC., a Minnesota)
 corporation; HUGH H. HARRISON;)
 and DOUGLAS A. RUSSELL,)

Appellees.)

F.C.Y. CONSTRUCTION AND EQUIP-)
 MENT COMPANY, INC., an Arizona)
 corporation; WINEGLASS LIVE-)
 STOCK COMPANY, INC., an Ari-)
 zona corporation; CHRISTINE)
 NICHOLS and CORRINE COOPER,)

Appellants,)

1 CA-CIV 3251

DEPARTMENT B

MEMORANDUM
 DECISION

v.)

HARRISON, INC., a Minnesota)
 corporation; HUGH H. HARRISON;)
 and DOUGLAS A. RUSSELL,)

Appellees.)

(Not for Pub-
 lication;
 Rule 48,
 Rules of the
 Arizona Su-
 preme Court)

(FILED: June 6, 1978)

Appeal from the Superior Court
of Yavapai County

Cause No. C-30465

Cause No. C-29494

(Consolidated)

The Honorable James Hancock, Judge

AFFIRMED

EUBANK, Presiding Judge

This appeal challenges summary judgments holding that appellants had no interest affecting title to the Eleven Lakes Ranch located in Chino Valley in Yavapai County, Arizona. Appellant argue that issues of material fact were raised in the pleadings, affidavits, and documents filed with the trial court. We disagree. The basic facts of this case are undisputed. Only the ultimate legal conclusions to be drawn from those facts remained for the trial court's determination. We believe the trial court correctly decided this matter, and therefore affirm the judgment.

Mr. B. A. Yarbrow, not a party to this action, once owned all or part of the Eleven Lakes Ranch. Appellants invested substantial sums of money in improving the Eleven Lakes Ranch while it was owned by Yarbrow. Between 1962 and 1964, all of the Eleven Lakes Ranch property was acquired by Arizona Savings and Loan Association at three separate sheriff's sales. Sheriff's deeds were issued after the applicable periods of redemption expired. On May 20, 1963, Yarbrow, his wife, and Wineglass Ranches, Inc. quit-claimed and assigned to

Arizona Savings and Loan any interest they had in the Eleven Lakes Ranch property. After Arizona Savings recorded its deeds, it owned Eleven Lakes Ranches free and clear of any rights of redemption or other claims.

In 1968 and 1969, the appellants were involved in litigation with Westec Corporation concerning several other ranches in the Chino Valley area.

The litigation was settled by an agreement among appellants, Westec, Yarbrow, Herbert E. Edwards, and Bernard S. Selwyn. Pursuant to the settlement, appellants agreed to a dismissal of their pending appeal against Westec, and Selwyn Arizona Associates (Selwyn and Edwards) agreed to purchase the ranches from Westec and hire Yarbrow to manage the properties. In some undisclosed manner appellants intended to receive a percentage of the profits derived from managing and selling the properties. Selwyn Arizona Associates apparently further agreed to acquire Eleven Lakes Ranch and include it in the agreement, even though Eleven Lakes was not involved in the litigation.

Selwyn Arizona Associates did not, however, acquire Eleven Lakes Ranch directly. On August 30 and September 15, 1968, Arizona Savings, while in receivership, obtained court permission to sell the Eleven Lakes property. On September 5, 1968, Arizona Savings deeded Eleven Lakes Ranch to Transamerica Title Insurance Company, as trustee of a real estate holding trust of which Henry C. Soto was the sole beneficiary. Subsequently, Soto transferred his beneficial interest in Eleven Lakes to Henry C. Soto Corporation. It

was from Soto Corporation that Selwyn and Edwards acquired the beneficial interest to Eleven Lakes Ranch on September 28, 1968. The beneficial interest was not assigned to Selwyn Arizona Associates, however, but to F.O.M. Investment Corporation. Bernard Selwyn accepted the assignment for F.O.M. as corporate secretary.

On July 26, 1968, before Selwyn and Edwards obtained the beneficial interest in Eleven Lakes Ranch, Selwyn Arizona Associates and Yarbrow entered into the first of two management agreements. The agreement provided that Yarbrow was to be employed as general manager of all Selwyn Arizona Associates' properties in Chino Valley, receiving a salary plus a bonus equal to twenty percent of the net profits of Selwyn Arizona Associates. Yarbrow was also given a conditional right of first refusal if Selwyn Arizona Associates decided to sell any of the property involved in the agreement. The occurrence that would defeat Yarbrow's right was Selwyn Arizona Associates' sale of any property at a price equal to Selwyn Arizona Associates' cost of acquisition plus twenty percent for every year Selwyn Arizona Associates owned the property. In exchange for these promises, Yarbrow was to turn over to Selwyn Arizona Associates all his interest in a number of properties in Chino Valley. Among the properties listed was "The Eleven Lakes Ranch, now owned by Arizona Savings and Loan Association, in receivership." Despite the inclusion of Eleven Lakes in the agreement, Yarbrow by that time had no interest in the property to transfer to Selwyn Arizona Associates.

Yarbrow assigned his contingent interest in the twenty percent bonus under the

management contract to two of the appellants on August 17, 1968. On September 20, 1968, he assigned to appellants the remainder of his rights under the contract.

After Selwyn and Edwards had acquired the beneficial interest to Eleven Lakes Ranch, Selwyn Arizona Associates and Yarbrow entered into a second management agreement. This agreement, executed on July 22, 1969, expressly superseded the first. The provisions in the second agreement for Yarbrow's compensation and right of first refusal were nearly identical to those in the first. The agreement also recited.

1. We recognize that you [Yarbrow] have had and/or presently have some interests in and to certain properties located in the Chino Valley which properties are as follows:

(e) The Eleven Lakes Ranch.

* * *

2. As you know, Selwyn Arizona Associates has for some time been conducting various activities in the Chino Valley looking toward the acquisition and development of certain properties in said Chino Valley. In this connection, you will recall that last year Selwyn Arizona Associates purchased the Eleven Lakes Ranch....

The 1969 agreement, like the 1968 contract, was a general management contract. The 1969 contract expressly rejected characterizing the agreement either as a partnership or a joint venture.

Yarbrow again assigned his right to

compensation under the agreement to appellants. He did not, however, assign his right of first refusal. On September 7, 1973, Yarbrow recorded both the 1968 and the 1969 agreements, certifying that the second superseded the first. At the same time he recorded his assignments of his rights to compensation under the contracts.

On April 1, 1972 Harrison, Inc., a Minnesota corporation, agreed to loan Selwyn-Edwards & Associates, a partnership \$200,000.^{1/} An additional \$25,000 was to be loaned later. Harrison's relationship with Selwyn-Edwards was specifically defined in the agreement as "one of lender and borrower," rather than as a "partner or joint venturer." To secure repaying of the loan Selwyn-Edwards agreed to cause to be assigned to Harrison the sole beneficial interest in Eleven Lakes Ranch. On April 5, 1972, F.O.M. collaterally assigned its beneficial interest in the trust holding Eleven Lakes Ranch to Harrison. Although Selwyn-Edwards held no record interest in the property, it joined in the Collateral Assignment as assignors. The assignment was expressly approved by Yarbrow as ranch manager.

Selwyn-Edwards subsequently defaulted on its indebtedness to Harrison. As a result, on October 19, 1973, F.O.M. directed Transamerica to terminate the trust and convey all the trust property to Harrison in satisfaction of the delinquent loan. Transamerica complied and conveyed Eleven Lakes Ranch to Harrison by warranty deed on October 22, 1973.

^{1/}Selwyn-Edwards & Associates is a different partnership from Selwyn Arizona Associates.

On the same day that F.O.M. directed Transamerica to convey Eleven Lakes Ranch to Harrison, appellants filed their first complaint in this action. They alleged that Selwyn and Edwards had failed to operate profitably a number of ranch properties, including Eleven Lakes Ranch. They further alleged that the loan to Harrison was in default and the transfer of Eleven Lakes Ranch was imminent. The appellants prayed for a declaration that Selwyn and Edwards held the ranches in constructive trust for them.

As a result of the conveyance to Harrison three days after the first complaint was filed, appellants filed a second lawsuit on September 6, 1974. This complaint was essentially similar to the first, but prayed for a declaration that Harrison held the property as constructive trustee for the plaintiffs. Appellants filed a lis pendens with both complaints.

Appellees moved for summary judgment in both actions on the grounds that appellants had no legal or equitable interest affecting title to Eleven Lakes Ranch. Both motions were granted, and the two cases were consolidated for appeal.

Appellants first assert that summary judgment was not proper because issues of material fact remained for determination. They point to the many allegations in their pleadings and motions that they possess an ownership interest in Eleven Lakes Ranch. These allegations are, at best, conclusory statements concerning ultimate facts. The only factual assertions advanced by appellants that are cognizable in a summary judgment determination are found in the affidavit of Corine Cooper. That affidavit essentially describes the agreement among

appellants, Westec, Yarbrow, Selwyn, and Edwards under which Selwyn-Edwards acquired Eleven Lakes Ranch and hired Yarbrow as general manager. These facts are undisputed. The only question is which party is entitled to judgment as a matter of law.

It seems clear that appellants have no legal interest in Eleven Lakes Ranch. The only rights appellants could have obtained are through the assignments from Yarbrow. Since the second assignment expressly superseded the first, it is the only one legally effective. The second assignment transfers only Yarbrow's right under the second management agreement to twenty percent of the profits obtained by the operation of Eleven Lakes Ranch. Even if it purported to convey more, Yarbrow had no further interest in Eleven Lakes Ranch to transfer. The second management agreement recognized only: ". . . you have had and/or presently have . . ." some interest in Eleven Lakes Ranch/ and from the title record of Eleven Lakes, it is clear that Yarbrow formerly had an interest in the ranch. However, the contract neither stated that Yarbrow currently had an interest nor purported to transfer an interest. Thus there was no way by which appellants could have obtained any legal interest in the title to Eleven Lakes Ranch through Yarbrow.

Appellants seek to impose a constructive trust on Eleven Lakes on the basis that it would be inequitable to allow Harrison to retain the property. They point out that they expected to receive substantial income from the management and sale of Eleven Lakes Ranch when they dismissed their litigation against Westec. According

to appellants, Selwyn and Edwards failed to operate the ranch profitably, thereby damaging appellants, who should be entitled to have the ebeneffits of ownership of Eleven Lakes Ranch. Further, they argue that a constructive trust can be imposed against Harrison, because the lis pendens filed on October 19, 1973 put Harrison on notice of appellants' claims to the property when it received the deed from Transamerica on October 22.

At this Court has previously stated:

A constructive trust is a remedial device created by courts of equity to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.

ARM, INC. v. TERRAZAS, 24 Ariz. App. 441, 442, 539 P.2d 915, 916 (1975). The question then is whether Selwyn and Edwards unfairly held the beneficial interest in Eleven Lakes Ranch when the appellants were justly entitled to hold it. Generally, a constructive trust will be imposed only when the holder of the property is guilty of fraud, either actual or implied. See HONK v. KARLSSON, 80 Ariz. 30, 37, 292 P.2d 455, 459-60 (1956). Appellants argue that a constructive trust may be imposed in the absence of fraud where the circumstances make it inequitable for the possessor to continue holding the property. See IN RE ESTATE OF ROSE, 108 Ariz. 101, 104, 493 P.2d 112, 115 (1972). Regardless of the merits of appellants' argument, the law is that the circumstances giving rise to a constructive trust (whether fraudulent or merely inequitable) must relate to the way in which title

See ARM, INC. v. TERRAZAS, 24 Ariz. App. 441, 443, 539 P.2d 915, 917 (1975). See also RESTATEMENT OF RESTITUTION § 183 (1937). The record shows that Selwyn and Edwards acquired the beneficial interest to Eleven Lakes Ranch from Henry Soto Corporation; and appellants have shown nothing in Selwyn and Edwards' contention of the beneficial interest to the property which would justify the imposition of a constructive trust. The acquisition of the ranch by Harrison was likewise without wrongdoing. Mere dispute or inequitable conduct between Selwyn and Edwards and the appellants cannot result in a constructive trust imposed on land acquired by Selwyn and Edwards from Henry Soto Corporation.^{2/}

Appellants have neither a legal nor equitable claim to Eleven Lakes Ranch. The summary judgments entered in favor of Harrison were correct.

^{2/} Appellants also argue that Harrison's interest in Eleven Lakes Ranch is only a mortgage. Selwyn-Edwards & Associates have a right to redeem the ranch until January 1, 1979. Appellants maintain that under A.R.S. § 33-702, this right of redemption renders Harrison's interest a mortgage. Even accepting appellants' argument, it is completely irrelevant to their claim of ownership. Further, the argument itself is totally frivolous and without merit. In order for a mortgage to exist there must be a debtor and a creditor. See COFFIN v. GREEN, 21 Ariz. 54, 58-59, 185 P. 361, 362-63 (1919). When Eleven Lakes Ranch was conveyed to Harrison, the relationship of Harrison to Selwyn-Edwards was no longer one of creditor and debtor. The conveyance satisfied the debt.

/s/ William E. Eubank
WILLIAM E. EUBANK
Presiding Judge

CONCURRING:

/s/ Laurance T. Wren
LAURENCE T. WREN, Judge

/s/ Levi Ray Haire
LEVI RAY HAIRE, Judge

APPENDIX "B"

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

F.C.Y. CONSTRUCTION AND EQUIP-)
MENT COMPANY, INC., an Arizona)
corporation; WINE-GLASS LIVE-)
STOCK COMPANY, INC., an Ari-)
zona corporation; and CHRIS-)
TINE NICHOLS and CORRINE)
COOPER,)

Plaintiffs, Appellants,)

v.)

TRANSAMERICA TITLE INSURANCE)
COMPANY OF ARIZONA, an Arizona)
corporation; SELWYN ARIZONA)
ASSOCIATES, a Partnership,)
RAMMCO INVESTMENT CORPORATION,)
a California corporation; HER-)
BERT E. EDWARDS; BERNARD S.)
SELWYN; HARRISON, INC., a)
Minnesota corporation; DOUGLAS)
A. RUSSELL; WESTEC CORPORA-)
TION, a Nevada corporation;)
TECH-SYM, a TECH-SYM, a Ne-)
vada corporation; B. A. YARBRO)
AND ENID YARBRO, his wife;)
FRANK KANAN, JOHN DOES I thru)
100 and all unknown heirs of)
the above defendants,)

Defendants, Appellees.)

1 CA-CIV 3250
1 CA-CIV 3251
(consolidated)

DEPARTMENT B

YAVAPAI County
Superior Court
Nos. C-30465
and C-29494

O R D E R

(FILED: July 10, 1978)

Appellants' Motion for Rehearing and the objection thereto were considered by the court, Presiding Judge William E. Eubank, and Judges Levi Ray Haire and Laurance T. Wren participating.

IT IS ORDERED denying appellants' Motion for Rehearing.

DATED this 10th day of July, 1978.

/s/ William E. Eubank
WILLIAM E. EUBANK, Presiding
Judge DEPARTMENT B

[Verification of mailing]

APPENDIX "C"

[LETTERHEAD OF THE SUPREME COURT OF THE STATE OF ARIZONA]

F.C.Y. CONSTRUCTION AND)	
EQUIPMENT COMPANY, INC.,)	
an Arizona corporation;)	
CHRISTINE NICHOLS and)	
CORRINE COOPER,)	
)	
Appellants,)	
)	
v.	)	No. 13867-PR
)	
HARRISON, INC., a Minnesota	)	Court of Ap-
corporation; HUGH H. HARRI-	)	peals
SON; and DOUGLAS A. RUSSELL,)	
	)	Nos.
Appellees.	)	1 CA-CIV 3250
	)	and 1-CA-CIV
	)	3251
	)	(Consolidated)
F.C.Y. CONSTRUCTION AND)	
EQUIPMENT COMPANY, INC.,)	
an Arizona corporation;	)	Yavapai County
WINEGLASS LIVESTOCK COM-	)	Nos. C-30465
PANY, INC., an Arizona cor-	)	and C-29494
poration; CHRISTINE NICHOLS	)	(Consolidated)
and CORRINE COOPER,)	
)	
Appellants,)	
)	
v.)	
)	
HARRISON, INC., a Minnesota)	
corporation; HUGH H. HARRI-)	
SON; and DOUGLAS A. RUSSELL,)	
)	
Appellees.)	
)	

The following action was taken by the

Supreme Court of the State of Arizona on
September 7, 1978 in regard to the above-
entitled cause:

"ORDERED: Petition for Review =
DENIED."

Record returned to the Court of Ap-
peals, Division One, Phoenix, this 8th
day of September, 1978.

CLIFFORD H. WARD, Clerk

By /s/ Becky Sanchez

Deputy Clerk